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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 958

MARCOS PEREZ JIMENEZ, *Petitioner*,

v.

GUY W. HIXON, UNITED STATES MARSHAL, SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION,

and

MANUEL ARISTEGUIETA, CONSUL GENERAL OF THE REPUBLIC OF VENEZUELA, MIAMI, FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

DAVID W. WALTERS
1008 Ainsley Building
Miami 32, Florida

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

May 3, 1963.

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PETITIONER'S REPLY MEMORANDUM

The respondents' Briefs in Opposition serve to underscore the importance of the questions presented in the Petition and to augment the appropriateness of review by this Court. The United States, by its assump-

tions and concessions, and the respondent Aristeguieta, by devoting most of his 61 pages to the merits, demonstrate the substantiality of, though not the solutions to, these questions. The widely divergent approach and viewpoints of the two respondents illustrate the need for a definitive resolution of the matters at issue.

Without attempting to cross-examine the manifold contentions of the respondents, petitioner submits this reply memorandum merely to highlight the relevant certiorari considerations apparent from the Briefs in Opposition.

1. Petitioner Has Standing to Raise the Constitutional Issue

The annoyance expressed by the United States (Brief in Opp., pp. 6-7) with petitioner's attempt "to agitate broad questions respecting the constitutional boundaries of the judicial power" has been rendered irrelevant by Mr. Justice Holmes in *Reid* v. *United States*, 211 U.S. 529, 539:

> "We observe that the plaintiff in error gives a hint of dissatisfaction with the Government for raising this point. But jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority, and it is no part of the defendant's duty to help in obtaining an unauthorized judgment by surprise."

Indeed, the very fact that the Court of Appeals *sua sponte* raised and decided this constitutional-jurisdictional issue moots any possible complaint about the belatedness of the constitutional challenge. The court was there exercising its duty "of its own motion to inquire into the matter, irrespective of the wishes of the parties." *Minnesota* v. *Hitchcock*, 185 U.S. 373,

382. That issue cannot now be avoided; nor can petitioner be faulted for pursuing it before this Court.[1]

Particularly is it appropriate for this Court to consider a constitutional issue, though briefed for the first time in this Court, that relates to "the proper administration of judicial business" and to "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers," *Glidden Company* v. *Zdanok*, 370 U.S. 530, 536. As stated by Mr. Justice Frankfurter in his dissent in *Lurk* v. *United States*, 366 U.S. 712, 713, "the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court." And now that such a constitutional query has been raised by the court below, a "litigious cloud" (*id.*) hangs over the constitutional capacity of federal judges to participate in § 3184 extradition proceedings, a cloud that can be removed only by this Court.

The force of these considerations is not dissipated by the suggestion that petitioner was not hurt by the participation of an Article III judge in these proceedings[2] or by any assertion that he got "*more* than his constitutional due" (Brief of United States in Opp., p. 6, n. 5). Petitioner here is as entitled as the peti-

[1] See *McGrath* v. *Kristensen*, 340 U.S. 162, 167, where this Court said: "The Government properly presents for our consideration an issue of federal jurisdiction not heretofore raised. The *quaere* is whether this proceeding involves a justiciable question under Article III of the Constitution."

[2] The extremely circumscribed judicial nature of a § 3184 proceeding and the necessity in such cases as this of considering and resolving political issues cast some doubt on the easy assumption that an Article III judge is really the best equipped to preside in such a case.

tioners in *Glidden* and *Lark* to insist upon compliance with the commands and limitations of Article III in a proceeding to which he is a party. Article III, said Mr. Justice Harlan in *Glidden*, 370 U.S. at 533, "is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record." Petitioner, in short, is entitled to insist upon an extradition proceeding conducted in accordance with the basic law of this land, including the historic constitutional doctrine of separation of powers.

2. The Grant of Certiorari Is Justified by the Absence of Any Decision of This Court During the Last Century Which Considers Extradition Proceedings in Light of Developments in the Interpretation of Article III

As the court below correctly noted (Pet. App., p. 10a), in no previous case has the question been raised—or decided—as to the constitutional capacity of an Article III judge to perform the advisory functions of § 3184. Since the enactment in 1848 of the progenitor of § 3184, approximately 25 extradition cases have come before this Court on their merits; of that number only 4 have involved § 3184 proceedings before federal judges.[3] And in none of those 4 cases was any question raised as to the power of the judges to participate in light of Article III.[4] In such circumstances, of course,

[3] A complete list of extradition cases before this Court on the merits appears in the Appendix hereto. Of these 25 cases, 18 arose before United States Commissioners, 4 before federal judges and 2 before state court judges. One additional case (*In re Metzger*, 5 How. (46 U.S.) 176) started before a federal judge prior to the enactment of what is now § 3184.

[4] The 4 cases are *Fernandez* v. *Phillips*, 268 U.S. 311; *Lincoln* v. *Power*, 241 U.S. 651; *Neely* v. *Henkel*, 180 U.S. 109; and one case before this Court three times, *Collins* v. *Miller*, 252 U.S. 364, *Collins* v. *Loisel*, 259 U.S. 309, and *Collins* v. *Loisel*, 262 U.S. 426.

these 4 cases stand as no precedent or authority on the constitutional question. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 38, and cases cited.

On the contrary, the relatively few cases originating before federal judges may well reflect a wide-spread recognition of the undesirability of utilizing the federal judiciary for nonjudicial functions.[5] Be that as it may, the important point is that no decision of this Court has involved the validity of a federal judge's participation in a § 3184 proceeding. *In re Metzger*, 5 How. (46 U.S.) 176, arose prior to the enactment of what is now § 3184. *In re Kaine*, 14 How. (55 U.S.) 103, involved a United States Commissioner, not a District Court Judge. To the extent that this Court has considered other types of treaty proceedings, resulting in determinations reviewable and reversible by an executive officer, it has uniformly denominated them nonjudicial "in the sense in which judicial power is granted by the Constitution to the courts of the United States." *United States* v. *Ferreira*, 13 How. (54 U.S.) 40, 48; and see *Hayburn's Case*, 2 Dall. 409. And two Attorneys General have applied this same description to extradition proceedings of the instant nature, labelling them outside the scope of Article III judicial power. 4 Op. Att'y. Gen. 201, 210-211; 6 Op. Att'y. Gen. 91, 96.

Neither respondent really challenges the non-Article III nature of the § 3184 procedure. The United States

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[5] Contrary to respondent Aristeguieta's assertion (Brief in Opp., p. 60), Venezuela through its competent American counsel made a conscious choice, selecting the District Court rather than a commissioner or state court judge as the forum for the § 3184 proceeding. The United States was not involved in that proceeding or in the choice that Venezuela made.

frankly assumes (Brief in Opp., p. 7) that the District Judge was here "acting as a mere administrative magistrate" and that "the court itself could not have adjudicated the matter." The respondent Aristeguieta is more ambivalent, asserting now (Brief in Opp., p. 15) that the § 3184 power "has traditionally been regarded as a part of or an incident to the judicial power defined in Article III," although he had earlier advised this Court (Pet. for Cert., pp. 20, 24, No. 1, October Term 1962) that the extradition judge is a "special legislative tribunal" that need not operate "within the strict scope of Article III of the Constitution."

Thus is brought into sharp focus the need for determining whether the metaphysical distinction between a court and a judge can justify the exercise of non-Article III judicial power by an Article III judge, a distinction whose speciousness is particularly evident in this case from the complete commingling of the court-judge concepts in the § 3184 proceeding.[6] The appropriateness of review by this Court is heightened by the fact that the *Metzger* and *Kaine* decisions, so heavily relied upon by both respondents, were rendered long before the modern development of the Article III limitations on the exercise of judicial power. Beginning with *Muskrat* v. *United States*, 219 U.S. 346, a landmark decision significantly ignored by both re-

[6] The reliance of the United States (Brief in Opp., p. 9) on the statement in *Todd* v. *United States*, 158 U.S. 278, 284, that a "court is not a judge, nor a judge a court" is misplaced when applied to a proceeding where all distinctions between court and judge were ignored. See Petition, pp. 36-41. The *Todd* case, moreover, did not involve an extradition proceeding. More importantly, the distinction between court and judge loses all meaning if effect is to be given to the strict commands of Article III. See Petition, pp. 30-36.

spondents, and continuing through *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, and *Gliddén Company* v. *Zdanok*, 370 U.S. 530, this Court has drawn from Article III limitations upon judicial power which were merely incipient at the time of the *Metzger* and *Kaine* decisions more than a century ago. A consideration of the impact of those limitations on §3184 proceedings is long overdue.

3. The Attempted Analogy to Ordinary Commitment Proceedings Neither Answers the Constitutional-Question Nor Negatives the Need for Review

Both respondents rely upon what the United States calls (Brief in Opp., p. 11) "the undisputed competence of Article III judges to act as committing magistrates in domestic cases" to substantiate the judicial participation in §3184 proceedings. While this Court has on occasion noted the seeming similarity between the two commitment procedures, it has never had occasion to contrast them *in the light of the limitations of Article III*. When that is done, the analogy breaks down completely.

The undeniable fact is that the ordinary commitment procedure before a federal judge or court relates to "matters of which it has the final decision under the law."[7] But a §3184 proceeding relates to a matter over which the judge or court does not have "the final decision under the law." The certification that issues

[7] *Collins* v. *Miller*, 252 U.S. 364, 369. In using this language, Mr. Justice Brandeis was speaking of habeas corpus proceedings; habeas corpus, of course, is a matter over which the court has final decision under the law and cannot be analogized to an extradition matter, the final decision of which is committed to the Secretary of State. So, too, a commitment on a charge of violating federal law relates to a criminal matter over which the court has the final decision.

is reviewable and reversible by the Secretary of State, an officer of the Executive Department.

So complete is the revisory jurisdiction of the Secretary of State that he considers himself to be, "in effect, . . . an appellate court."[8] When proceedings are certified to him from the committing magistrate, they come to him "upon a *quasi certiorari*," his review extending "to a review of every question therein presented."[9] He may reverse, remand, approve or amend the magistrate's findings and conclusions in any way he sees fit, and "he may differ from the committing magistrate as to the weight or sufficiency of the evidence to support the charges."[10]

Thus the Secretary of State could, under this broad review power, reverse the magistrate's finding in this case that there was insufficient evidence to support the murder charges against petitioner.[11] *But* "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Chicago & South-*

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[8] Memorandum of Office of the Solicitor for the Dept. of State, June 22, 1921, quoted in IV Hackworth, Digest of International Law 153 (1942).

[9] Opinion of Solicitor General Phillips to Secretary of State, 17 Op. Att'y. Gen. 184, 185 (1881). The opinion further states (p. 186): "Upon the *requisition* being made for extradition, *the whole matter* comes before the Secretary."

[10] Memorandum of Counselor Anderson to Secretary of State Knox, Feb. 5, 1912, quoted in IV Hackworth, Digest of International Law 174 (1942). Moreover, the Secretary is said to have the right to consider any judgment of a habeas corpus court as "gratuitous and impertinent." *Id.*, 173.

[11] The contrary assertion by the respondent Aristeguieta (Brief in Opp., p. 29) is unsupported by any authority to contradict the foregoing opinion and memoranda.

ern Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103, 113. Therein lies the fatal constitutional defect of § 3184, the defect that should command the most serious consideration of this Court.

4. The Absence of an Applicable Definition of a Political Offense Justifies Review for the Purpose of Formulating Such a Definition

The respondents seek to avoid the formulation of a relevant definition of a political offense, for purposes of Article III of the Treaty of Extradition between Venezuela and the United States, by misstating petitioner's contentions. Petitioner does not contend that the financial crimes alleged against him are political in nature simply because he is a former head of state or because there is political enmity between him and those presently in power in Venezuela.

What petitioner does claim is that the time has arrived for a delineation of the political crime concept for use in such a proceeding as the instant one, a delineation that will be meaningful in light of the complex political background and turmoil here evident. Just as it is inadequate merely to say that petitioner is a former head of state and hence immune from extradition, so is it inadequate merely to say that he committed a common crime to his financial enrichment and hence must be extradited.

In light of this Court's admonition that an extradition treaty should not be the pretext for "wreaking individual malice, or forcing the surrender of political offenders," *Grin* v. *Shine*, 187 U.S. 181, 185,[12] peti-

[12] But cf. United States Brief in Opp., p. 13: "Whether the demanding government is moved by a concern for justice, by political considerations or by vindictiveness is not a justiciable issue."

tioner suggests that the entire political mosaic in Venezuela should have been examined by the extradition magistrate, that all elements of the governmental operations involved in the alleged financial crimes stemming from "abuse" of his high office should have been considered, and that all the political turmoil, enmity, violence and upheaval in Venezuela should have been considered in arriving at any fair determination of the political nature of these charges. Such is precisely the kind of investigation made by the extradition magistrate in *In re Mylonas*, 187 F. Supp. 716 (N.D. Ala.), causing him to conclude that the charge of embezzlement (to the defendant's personal enrichment) was "incidental to, formed a part, and was the aftermath of political disturbances [in Greece], and accordingly 'of a political character' of the nature proscribed by the Treaty." Such is the kind of investigation that should have been made in this case.

The United States concedes (Brief in Opp., p. 13) that the situation might be different in its view if there were some allegation that the crimes "were committed at a time of political upheaval and the funds were used to further a political objective." But such is precisely among the allegations made in this case. Petitioner does maintain that these "crimes" occurred during a time of political upheaval and turmoil in Venezuela. And he does maintain that the funds were used for political purposes. Time and again petitioner made the latter allegation before the committing magistrate (Tr. 3138-3150), only to be precluded from offering any testimony or proof thereof (Tr. 3150).

What is needed, therefore, is a meaningful guideline for the magistrate to follow in assessing the political characteristics of these charges.

5. The Procedural Issues Stem Largely From the Confusion as to the Constitutional Capacity of an Article III Judge to Participate in a § 3184 Proceeding and Underline the Need for Resolving That Confusion

The uncertainty surrounding the power of a federal judge to preside over a § 3184 proceeding is dramatically reflected by the procedural morass into which this case fell in the District Court. The subpoena problems stemming from this proceeding, now the subject of Nos. 1 and 4 before this Court, are the direct result of the confusion over the nature of a § 3184 proceeding and the powers of a federal judge in relation thereto. So also, the problems as to Judge Mathes' participation are inextricably entwined with this basic jurisdictional problem.

Thus, in seeking to sustain Judge Mathes' power to participate in the § 3184 proceeding in the light of Article III, the United States (Brief in Opp., p. 7) refers to him "as a mere administrative magistrate." If that be true, how could his jurisdiction to continue herein be affected by the end of his assignment as an Article III district judge? How could it be the business of the Judicial Council for the Fifth Circuit to seek to relieve "a mere administrative magistrate" of his duties in a § 3184 proceeding, duties which the Government assumes (Brief in Opp., p. 7) could not be performed by an Article III court? The problems of Judge Mathes' powers and tenure "as a mere administrative magistrate" are not answered by describing him as a *de facto* or *de jure* judge.

All of this reemphasizes the incongruity of any distinction between a court and a judge in these circumstances. To recognize that incongruity, to hold that the advisory function of an extradition magistrate is

none of the constitutional business of federal courts and judges, is to eliminate the procedural infirmities which have grown around the maintenance of the court-judge fiction in this case.

One final word need be said about the respondents' reliance on Judge Whitehurst's certificate to the effect that it was reached "upon consideration of all the evidence submitted." Tr. 4316. It is undenied that Judge Whitehurst impeached his own certificate by admitting that he had not read all the evidence. Moreover, the certificate itself was prepared and submitted to Judge Whitehurst by counsel for the demanding government. Tr. 4254, 4256, 4265, 4284, 4311-4312.[13] Under these circumstances, nothing in *United States* v. *Morgan*, 313 U.S. 409, requires acceptance of the certification at its face value and denial of petitioner's right to a decision based on a reading of all the evidence.

CONCLUSION

For these reasons, supplementing those in the Petition, the writ of certiorari should issue.

Respectfully submitted.

DAVID W. WALTERS
1008 Ainsley Building
Miami 32, Florida

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

May 3, 1963.

[13] A reading of the entire conference before Judge Whitehurst on June 23, 1961 (Tr. 4262-4313), reveals the prejudice to petitioner resulting from the failure to read all the evidence. See, e.g., Tr. 4296-4297.

APPENDIX

Extradition Cases Before This Court on the Merits

A. Cases in which § 3184 proceedings originated before U. S. Commissioner:

1. In re Kaine, 14 How. (55 U.S.) 103.
2. Benson v. McMahon, 127 U.S. 457.
3. In re Oteiza y Cortes, 136 U.S. 330.
4. Ornelez v. Ruiz, 161 U.S. 502.
5. Bryant v. United States, 167 U.S. 104.
6. Rice v. Ames, 180 U.S. 371.
7. Terlinden v. Ames, 184 U.S. 270.
8. Grin v. Shine, 187 U.S. 181.
9. Wright v. Henkel, 190 U.S. 40.
10. Pettit v. Walshe, 194 U.S. 205.
11. Yordi v. Nolte, 215 U.S. 227.
12. Glucksman v. Henkel, 221 U.S. 508.
13. McNamara v. Henkel, 226 U.S. 520.
14. Kelly v. Griffin, 241 U.S. 6.
15. Bingham v. Bradley, 241 U.S. 511.
16. Factor v. Laubenheimer, 290 U.S. 276.
17. Volentine v. United States, 299 U.S. 5.
18. Karadzole v. Artukovic, 355 U.S. 393.

B. Cases in which § 3184 proceedings originated before U. S. District Court Judges:

1. In re Metzger, 5 How. (46 U.S.) 176 (an analogous proceeding under a treaty prior to enactment of § 3184).
2. Neely v. Henkel, 180 U.S. 109.
3. Lincoln v. Power, 241 U.S. 651.
4. Collins v. Miller, 252 U.S. 364.
   Collins v. Loisel, 259 U.S. 309.
   Collins v. Loisel, 262 U.S. 426.
   } All one case.
5. Fernandez v. Phillips, 268 U.S. 311.

C. Cases in which § 3184 proceedings originated before state court judge:

1. Elias v. Ramirez, 215 U.S. 398.
2. Charlton v. Kelly, 229 U.S. 447.